

ZIMRE REINSURANCE COMPANY LIMITED
And
BELL ATLANTIC (PRIVATE) LIMITED
And
NATIONAL REAL ESTATE LIMITED
And
CLIFFORD MUMBENGEWI

HIGH COURT OF ZIMBABWE, HARARE
KARWI J
HARARE, 26 July 2010 & 20 October 2011

Civil Trial

P Nyeperai, for plaintiff
Mr Warara, for defendants

KARWI J: The plaintiff issued summons out of this court claiming against defendants the cancellation of a contract of sale of flat number B012 Odzi Court between itself and the defendants and costs of suit. The plaintiff stated in its declaration that on 5 February, 2001 parties entered into an agreement in terms of which the plaintiff appointed the second defendant as its agent to find purchasers for its property situate at Stand No. 18336 Harare Township also known as Eastview Gardens. It was an implied term of the agreement that in discharging the mandate, the defendants would disclose their interest in any transaction that they enter into on behalf of the plaintiff and the defendants had to act always in the best interest of the plaintiff. Despite the said terms and during the course of the performance of their mandate, the second and third defendants sold Flat No. B012 Odzi Court to the first defendant. The third defendant was a director of both the first and second defendants at the material time when the defendants were in a situation where there was a clear conflict of interest. The flat was sold to the first defendant at a price that was lower than the market rate prevailing at the time to the prejudice of the plaintiff. As a result of the breach, the plaintiff repudiated the

contract entered into on its behalf and tendered the purchase price back to first defendant if it proves that it had actually paid for the flat.

Two witnesses gave evidence during the trial, the plaintiff, represented by Edison Muvingi, the managing director of Zimre Properties (Pvt) Ltd, a property division of the plaintiff and Clifford Mumbengegwi, the third defendant and also a director of the second defendant. Muvingi testified that the plaintiff through a letter dated 5 February 2001 appointed the second defendant to be part of the disposal team to sell on commission, Eastview Gardens, the property of the plaintiff on its behalf under the following terms and conditions. The sales were to be strictly cash (including loans and mortgage bonds). The cash was to be forwarded directly to the plaintiff, without any delays and any refunds for failed sales were to be effected by the plaintiff in cash. The plaintiff's preference was for people wanting to purchase in blocks before offers were extended to individual buyers. The second defendant was to be offered one block after the other for sale. The prices of the flats were as follows, 54 to 64 square meters - \$900 000-00, 65- 74 square meters - \$950 000-00 and 75- 84 square meters - \$1 100 000-00.

The second defendant accepted the mandate to sell the property. Prices as indicated above were set and communicated to the agent. This was a clear agent and principal relationship. Initially the second respondent was the only one, but later more agents were mandated to sell parts of the property as well. The disposal process then began in earnest in 1999 at predetermined prices. Various people signed agreements of sale for various properties. The agreement of sale in respect of the property in issue, that is flat number B012 Odzi Court was signed on 30 July 2002. In terms of an extract of minutes of a meeting of the board of directors of the first defendant the third defendant was authorized and empowered to sign and execute on behalf of the first defendant. In pursuance of the board resolution, Mumbengegwi signed on behalf of the first defendant. It is also worth noting that Mumbengegwi also signed the declaration as agent of the seller, documents meant for the transfer of the same property. Mumbengegwi represented both the seller and buyer in the sale. Muvingi told the court that the plaintiff became aware of the conflict of interest when they received a request for transfer. He added that other than the fact that there was a conflict of interest they also discovered that

the flat had been sold in 2002 at the 2001 price, which was a give away price considering the high inflation obtaining in the country at that time. The flat had been sold at a price of \$900 000-00, at a time when the second defendant was selling the same units elsewhere for a price of \$5.5 million. A newspaper advertisement from The Herald newspaper of 3 June 2002 placed in the said newspaper by the second defendant and for a similar flat at Eastview Gardens, same place as the flat in dispute, showed that the advertised price was indeed \$5.5 million. Muvingi told the court that after discovering the above anomalies the plaintiff refused to sanction the sale and declined to effect the transfer which had been requested by the third defendant. Muvingi stressed that prices were preset after advice had been requested from the second defendant, who was the professional in the field. For more than a year the second defendant had not advised on the need to review the prices, despite the fact that inflation had escalated thereby necessitating a price review. The plaintiff felt therefore that there had been a deliberate withholding of information pertaining to the need for a price review by the second defendant. Muvingi advised the court that from public information obtained inflation in the country in February 2001 was about 57% while it was 123% in July 2002.

Muvingi added that the plaintiff also declined to sanction the sale because it appeared that the plaintiff had not been paid for the stand. A schedule showing sales remittances for the plaintiff dating from June 2001 to 26 March 2003 which was produced in evidence failed to show that payment had been made for the flat in question. The document was also not signed and in some instances it was hand written. Its authenticity was highly questionable.

Mumbengegwi gave evidence for and on behalf of the defendants and on his own behalf. He said he joined the plaintiff in 1990 and after serving in various capacities, he became deputy chief executive officer in 1996 and became responsible for properties of the whole group. He became an ex officio member of the board. In 1999 the board took a decision to re align the investment portfolio to the re-insurance business. This involved disposing of more than half of the plaintiff s properties, about 4000 altogether. Because of the magnitude of the exercise, a property division had to be established as a separate company. The second defendant was then formed and Mumbengegwi was made the

managing director thereof. Rules were then set on how the disposals were to be conducted and the prices of the various pieces of properties were then set. Mumbengegwi said disposals started in 1999 with the sale of over 2000 stands in Ruwa, Harare. All the stands were sold at fixed and pre-determined prices. Disposal of the first lot spanned from 1999 to 2001. The second lot of disposals took place from 2000 to 2001 and involved the sale of flats in Marlborough, Mount Pleasant, Avondale and Glen Norah, all in Harare. They were all sold at fixed prices. All the employees of the parties took part in the sales without the need to declare their interest. These were the rules set and agreed to. Mumbengegwi said that during the period extending from 1999 to 2001 he bought 9 (nine) properties in his personal capacity and through his other companies. All the properties had since been transferred.

Mumbengegwi further testified that the third lot came up for sale in 2001 of which the property in question was a part. He said the second defendant was mandated to dispose of Eastview Gardens. He said with regard to Eastview Gardens, prices were fixed in 2001 by the plaintiff after advice from the second and third defendants. He said thereafter it was not his responsibility to call for a review of the prices even in the face of spiraling inflation. He added that there was a time he thought the prices were too low. He raised the issue verbally in management meetings but was advised that the issue would be looked into, but it was never done. He acknowledged that other players were selling the same units for two to three million dollars.

Mumbengegwi told the court that the particular flat in question was available for sale. He bought it through the first defendant in which he was director. Payment was made for it although the plaintiff says it was not. The application for transfer was then made but the plaintiff refused to sanction the sale and wished to cancel the agreement. He said that in as far as the sale was concerned, he signed the agreement on behalf of the seller while a Mr Chipato signed on behalf of the purchaser. Payment was made to second defendant on 20 August 2002. The money was subsequently sent to the plaintiff although he said he had no proof that the money was received. Mumbengegwi emphasized that it was not his duty to advise the plaintiff about the review of the prices. He suggested that there was bad blood between him and Mr Mawere. He said that

towards the end of 2001 the second respondent was sold by the board to management and staff for a figure of \$29 million. The plaintiff itself was sold to Mr Mawere's group of companies. He said Mr Mawere was not happy that the second respondent had been sold. He raised the issue with Mumbengegwi demanding a reversal of the sale. A misunderstanding arose between him and the Mawere group. He suggested that this matter was probably a way of getting at him by that group. They wanted to push him to reverse the sale which he could not do.

At the pre-trial conference of this matter a number of issues were referred to trial. These are;

1. Whether or not there was a principal and agent relationship between the plaintiff and the second defendant.
2. What were the terms and conditions of the relationship between the plaintiff and the second defendant?
3. Did the second and the third defendants breach the terms and conditions of sale as alleged by the plaintiff or at all?
4. Whether the second and third defendants sold the flat to first defendant at a price that was lower than the market price of the flat
5. Whether the agreement should be enforced or cancelled.
6. Whether the flats at Stand 18336 were being sold in blocks at prices preset by the plaintiff.

All the issues will be taken as one for purposes of determination. The relationship of the parties in this matter is very clear. It is not in dispute that the plaintiff gave the second respondent a mandate to dispose of its properties in Harare, on its behalf for a commission. That clearly established a principal and agent relationship between the parties. The plaintiff hired second respondent for its specialized knowledge in selling of properties. The second respondent was expected to act as agent of the plaintiff. There is no doubt that the duties of the second respondent were therefore paramount and were not subordinated by the fact that it was a subsidiary of the plaintiff. In other words the plaintiff and the second respondent were not merely one and the same person because of the second respondent was a subsidiary of plaintiff. The second respondent cannot run

away from the need to observe the duties of an agent on the basis that there was no principal and agent relationship between them. Nigel Savage and Robert Bradgate in their book *Business Law* at p 375 define:

“An agent as a person who is recognized by law as having power to enter transactions creating legally binding rights and obligations for his principal. In this case, the second defendant was granted power by the plaintiff to enter transactions with buyers who were buying the plaintiffs’ properties. Where the agency relationship is contractual, as is in this case, the agent’s duties and his rights may be set out in the contract. However, even if not expressly set out, certain terms will be implied in the agency contract by law, so that they will apply unless expressly excluded. As a result, the agent is placed in a special position of trust and the relationship between principal and agent is said to be a fiduciary one. It therefore follows that the agent has a duty to follow his principal’s instructions. He would be liable for breach of contract if he fails to act at all. An agent also owes a duty to their principals to exercise reasonable care and skill in the exercise of their mandate. Where the agent is, or holds himself as being, a member of a profession, or acting in the course of a business, he will be expected to show the standard of care expected of a reasonably competent practitioner of his trade or profession. An agent who is appointed to sell property must take reasonable care to obtain the best possible price, by passing all relevant information to his principal”. Nigel Savage and Robert Bradgate further states that “the principal must depend on the agent and because of that dependency the law imposes on the agent a duty to show good faith in his dealings with the principal. One aspect of that general duty is the agent’s duty to avoid any situation in which his own interests may come into conflict with those of his principal. If such a situation arises, the agent is in breach of duty and this is so even if the agent can show that he acted throughout in total good faith and in the best interest of his principal. Such a conflict may arise, for, when the agent buys property from, or sells his own property to his principal. The possibility of conflict is clear for the seller’s concern is to get the best price for his goods while the buyer’s is to pay the lowest possible price. If the agent deals with the principal in this way he is liable in breach of duty even though he may be able to show that he acted in good faith and the price was fair. Where a conflict of interest arises between principal and agent, the latter is liable for breach of duty unless he can show that he fully disclosed all relevant facts to his principal, who consented to the transaction in question. Where the transaction involves the agent buying or selling property from or to his principal, he must also show that the price was a fair market price. If these requirements are not fulfilled, the principal may set aside the relevant transaction...”

It was also held in *Mallinson v Tanner*, 1947 [4] SA at p 684 that:

“ where an agent has an interest that is adverse to his principal s interest , then the onus is thrown on the agent to show that he had made a complete disclosure to his principal and in addition to that , that the principal has acquiesced to the transaction.”

The fact of the matter is that second respondent was mandated by the plaintiff to sell its properties in Harare at given prices during the period extending from 1999 to 2002. It was to sell those properties on commission. It seems to me that a clear principal and agent was created between the parties. The second respondent was therefore duty bound to observe all the duties which obtain between principal and agent which were discussed above. Despite the need to observe those duties, it is clear that the second respondent breached those duties by failing to disclose its interests in the transaction. It went on to sell one of the plaintiff s’ properties to a company where one of its directors, Mumbengegwi was also director. It is not in dispute that Mumbengegwi was a director in both the second defendant and first defendant, which company bought the property in question. As a result of the transaction a situation was created where the second respondent sold the plaintiff s property to a sister company. Effectively both the seller and the buyer were one person. An untenable and unacceptable conflict of interest situation was therefore created. The third defendant failed to disclose his interest in the transaction to the plaintiff. The property was also sold at what has been proved to be an unreasonable price at the time. It was proved that the flat was sold at \$900 000-00 at a time second respondent was selling similar properties at \$5.5 million. The whole transaction lacked transparency. The third defendant definitely abused his position. He did so by withholding the real market value of the flat in question from the plaintiff in order for him to sell it at a give away price to a company where he was a director. Both the second and third defendants owed the plaintiff a duty to provide professional advice regarding the market price of the property. They also owed the plaintiff the duty of utmost good faith which they failed to do.

There is therefore no doubt that the defendants are liable for breach of their fiduciary duties. The transaction concerned cannot be sanctioned. It has to be cancelled.

IT IS THEREFORE ORDERED THAT:

The agreement of sale whose subject matter is Flat number B012 Odzi Court, Harare, entered into by and between the plaintiff and the first defendant be and is hereby cancelled. The defendants are ordered to pay costs of suit.

Costa & Madzonga, plaintiff's legal practitioners
Warara & Associates, defendants' legal practitioners